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No. 419

IN THE

# SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1965**

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ROLAND E. BARNES, *Petitioner,*

*v.*

ABRAHAM S. SIND AND ISRAEL COHEN, ET AL,
*Respondents.*

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT**

---

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*To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:*

Petitioner, Roland E. Barnes, prays that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit in this case.

### Opinion Below

The initial opinion of the Court of Appeals, dated February 5, 1965, is reported at 341 F.2d 676. The opinion and dissenting opinion of June 4, 1965, on a Petition for

Rehearing En Banc are not yet reported. The opinions and judgment in the court below appear *infra*, pp. 16 to 25.

## Jurisdiction

The opinion and judgment of the United States Court of Appeals for the Fourth Circuit were entered on February 5, 1965. A timely Petition for Rehearing En Banc was denied on June 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## Question Presented

Developers of an all-white housing project reluctantly signed a contract to sell a house to one Negro purchaser. When they reneged on the contract, the buyer (petitioner herein) brought a diversity suit for specific performance in federal court. Although the contract of sale called for a warranty deed and sellers had given all white buyers clear title, the District Court ordered only a quitclaim deed for petitioner. When petitioner appealed to the court below for a warranty deed, that court denied specific performance entirely. On these facts, the question presented is whether, consistent with the requirements of equal protection, a federal court may arbitrarily refuse specific performance to a Negro home buyer of the purchase terms expressly promised by the defaulting sellers and granted to all their white purchasers.

## Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides, in part, that "no person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

The Fourteenth Amendment provides, in part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. Section 1982 provides that: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

## Introduction

This case involves an incredible story of housing discrimination, within the very shadow of the Nation's Capitol, supported and assisted by the federal courts.

Petitioner, Dr. Roland E. Barnes, a Negro resident of the District of Columbia, sought to obtain a home in a housing development near the Rockville, Maryland, public elementary school of which he was principal. The seller's agent at the development accepted his deposit, but it was returned to him because the sellers were unwilling to sell to a Negro. After lengthy negotiations and threat of suit, the sellers (respondents here) entered into a formal settlement agreement promising petitioner a house on a lot substantially equivalent to the one for which his deposit had been returned. But instead of a lot of the promised quality, respondents tendered to Dr. Barnes a far smaller lot at a much less desirable location where "he would be seen the least." Petitioner filed a diversity suit; the District Court found a breach of contract, but it arbitrarily relegated petitioner to a quitclaim deed instead of the "special warranty deed" promised in the agreement of sale. A divided Court of Appeals struck down even this limited specific performance, on the ground that since petitioner was still asking for the promised "special warranty deed" the court was unwilling to give him, he should have no house at all.

The sequence of events demonstrates, as dissenting Judge Sobeloff said, that the majority ruling below has made it "comparatively safe to renege on a sale to a Negro pur-

chaser." The sellers, the District Court, and finally the Court of Appeals, each played their role in the process by which the housing development remains all white and petitioner must continue to commute daily to Rockville, where he is acceptable as a public school principal but not as a neighbor. Instead of utilizing "particular care" (*Bolling* v. *Sharpe*, 347 U.S. 497, 499) to vindicate petitioner's rights, the courts below have become participants in a venture admittedly discriminatory in purpose and result.

## Statement of the Case

In May, 1961, petitioner, Dr. Roland E. Barnes, became Principal of the Travilah Elementary School in Rockville, Maryland (Tr. 47).[1] Later that year when Mrs. Barnes also became employed in the Rockville school system and their two children were enrolled in school there, the daily 44-mile round trip from the Barnes residence in the District of Columbia to Rockville was found too burdensome (A. 35). Accordingly, in the summer of 1961 Dr. Barnes determined to purchase a home in the Rockville area.

(i) *The first home-purchase.* Having seen an advertisement in a Washington paper (A. 11), on October 9, 1961, Dr. Barnes visited the Rockville housing development owned and being constructed by respondents, Abraham Sind and Israel Cohen (A. 37). Dr. Barnes found the proffered homes suitable; he selected a style of house and location (Lot 9, Block 3), signed a purchase agreement which was countersigned by the realtor's agent on the premises (A. 12-13), and put down a one thousand dollar deposit (A. 37). The agreement stipulated March 15, 1962, as the estimated

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[1] "Tr." references are to the transcript of the trial in the District Court, on file with this Court. "A" references indicate the pages of the record printed as the Appendix to petitioner's brief below, nine copies of which are filed with this Court.

occupancy date (A. 13). Two days later the deposit was returned by the realtor with a notation that "this deal cannot be consummated at this time" (A. 37). The deposit was returned and the sale renounced because the sales agents "knew that defendants were unwilling to sell a lot in the development to a Negro" (A. 37).

(ii) *The second home-purchase.* Dr. Barnes promptly retained counsel, who communicated with the realtor and then with respondents, and on November 28, 1961, Barnes and respondents sat down with their attorneys at a negotiating meeting. At that meeting, respondents took the position they would not sell a house to a Negro for two years (Tr. 335) since an earlier sale would hurt their all-white development (Tr. 69). Dr. Barnes, on the other hand, urged that it was essential for his family to move into a new home near Rockville by the commencement of the 1962-63 school year (Tr. 72). After further negotiations and following threat of suit by petitioner, a settlement agreement was signed between the parties on January 9, 1962, under which respondents agreed to provide Dr. Barnes with the house and lot he had originally selected or "an identical house on an equivalent lot" in their development no later than August 31, 1962, under the same terms stated in the purchase agreement of October 9, 1961 (A. 16).[2]

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[2] Respondents' major defense at trial to the agreement of January 9, 1962, was a strange attack upon petitioner's counsel for "duress" in threatening suit and resultant publicity on the October 9 purchase agreement (A. 12). But sellers who practice racial discrimination in housing cannot demand the right to do so in secret, free from litigation of buyer's rights, and it is hard to see what is inequitable about a proposed suit by a Negro school principal whose home purchase contract and deposit are returned by the sellers because they desire to keep their housing development racially segregated. At any rate, the District Court found that the contract of January 9, 1962, was "not induced by duress on the part of plaintiff or his counsel" (A. 42) and this finding was not disturbed by the Court of Appeals.

(iii) *Sellers renege again.* On July 31, 1962, respondents finally showed Dr. Barnes a house in their development; although the house was identical to the one he had selected, the lot, far from being equivalent, was much less desirable, was poorly located, and significantly smaller in size. Respondent Sind explained on cross-examination at trial (Tr. 356), that he had selected this as the only lot to be offered to Dr. Barnes because at that spot he would be hidden from view: "I thought, if I put the man in the middle of a block, he might not be seen as often." It "is quite obvious," said Sind, that this was the house where Dr. Barnes "would be seen the least."[3] Reneging further, respondents refused to arbitrate the question of equivalence in accordance with the contract arbitration clause (A. 16, 40).

(iv) *District Court denies promised warranty deed.* Following suit by petitioner in the District Court for Maryland and an extensive trial, Judge Thomsen ruled on November 12, 1963, that respondents were guilty of the breach alleged in that the offered lot was not equivalent to the original lot in a number of significant respects (A. 40), and that therefore the respondents breached their agreement to sell to petitioner the original house or "an identical house on an equivalent lot." The District Court ordered the transfer of the house and property located at 11810 Smoke Tree Road—the lot among those still available at the time of trial most nearly alike to the one first chosen by Dr. Barnes (A. 43).[4] The court limited petitioner's

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[3] Respondents' fierce desire to make sure that no Negro could buy into their development was further evidenced about the same time by the inclusion in all their sales agreements of a provision forbidding resale for a period of time without respondents' permission, a clause they conceded to have been racially motivated (Tr. 380-382).

[4] The District Court had previously issued a preliminary injunction against sale of this house and lot (A. 41). The house remains vacant, but closed to petitioner, while he seeks redress here.

compensatory damages to $1,500 for extra travel costs incurred by Dr. Barnes when he was unable to move near his school in Rockville during the 1962-63 academic year (A. 45) and wholly denied damages for additional hours of travel, loss of professional contacts with his school community, and related professional damages (A. 45). It also declined to enforce the liquidated damage clause agreed to by the parties (A. 45).[5] Finally, and without explanation, the District Court's decree of specific performance (A. 46) ordered respondents to provide petitioner only with a *quitclaim deed* instead of the "good and sufficient special warranty deed" which they had expressly promised in their agreement (A. 12, 16)—thus denying petitioner the clear title granted white purchasers under the identical form of sales agreement.[6]

(*v*) *Court of Appeals denies petitioner a home.* The court below affirmed the District Court's refusal to grant specific performance of the "special warranty deed," because it might somehow impair the possible dower interest of the wife of one of the respondents. Adding insult to this injury, the court below then struck down even the limited quitclaim deed ordered by the District Court, on the ground that since petitioner wants a house with the promised "special warranty deed" which the court thinks he may

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[5] The contract expressly stipulated that "in view of the damage which will be suffered by Barnes and his family" from delay in performance, sellers agreed to pay "as liquidated damages for violation of this agreement $100 a day . . . *Provided*, however, that liquidated damages under this Agreement shall not exceed $15,000" (A. 17). While petitioner urges, *infra*, p. 12, that this Court summarily reverse and direct the granting of a house with a warranty deed, in the event this Court grants review without summary reversal, we respectfully preserve the question as to the failure below to enforce the liquidated damage rights of petitioner.

[6] Although the District Court never expressly so stated, he apparently denied the promised warranty deed because he thought such a deed might somehow adversely affect the possible dower interest of the wife of one of the respondents (A. 44).

not have, he should have no house at all (see p. 20, *infra*).

(*vi*) ***Rehearing petition evokes sharp dissent.*** Dr. Barnes filed a timely Petition for Rehearing En Banc, pointing out that "the Court rules for the admitted housing discriminators on a ground patently erroneous on its face." As petitioner emphasized, "The Court's ruling that because dower cannot be expunged in this action defendants may give less than the warranted title they promised is a non sequitur," and "its ruling that because plaintiff seeks more than the Court holds he may have he should have no house at all, achieves the ultimate racial injustice even the District Court sought to avoid." The petition for rehearing, citing *Shelley* v. *Kraemer*, 334 U.S. 1, and 42 U.S.C. 1982, concluded as follows:

> "This Court holds that builders of suburban housing who regularly sold to white purchasers but breached their contract to their single Negro buyer for racial reasons, need not convey the same warranted title they promised him and conveyed to all their white buyers. If this result is required by Maryland law, that law transgresses Fourteenth Amendment rights. . . . This Court's ruling infringes on Fifth and Fourteenth Amendment rights for it denies housing to a Negro on the same terms that sellers—who breached their contract because of plaintiff's race—conveyed in their housing development to their white purchasers. And the effect of the Court's action is not only to deny equal protection to a Negro home buyer, but in effect to deny the Principal of the Travilah Public Elementary School in Rockville the opportunity to buy a new home within the area of his school community because he is a Negro."

In its June 4, 1965, disposition of the petition for rehearing (*infra*, p. 21), the court below divided 3-2.

Judge Haynsworth, writing for the majority, failed even to attempt an answer to petitioner's contentions. Judge Sobeloff, for himself and Judge Bell, took direct issue with the substitution of a quitclaim deed for the promised special warranty deed, and then noted that the Court of Appeals majority "far from correcting this alleged error of the District Court, puts the plaintiff in a worse position by taking away the limited relief granted him by way of specific performance." Finding it under these circumstances "legally arbitrary" to deny the remedy of full specific performance, the dissent concludes by noting that the majority's disposition of the case "will have no deterrent effect upon other developers who discover that it is comparatively safe to renege on a sale to a Negro purchaser" (*infra*, p. 24).

As we urge below, a significant constitutional violation arises from the judicial support here given to racial discrimination—a violation which can best be righted through the summary reversal of an erroneous legal ruling under which respondents' only Negro purchaser is arbitrarily denied the home with a clear title which all white buyers have freely received.

## REASONS FOR GRANTING THE WRIT

1. In this case respondent housing developers defaulted for racial reasons on their contract to convey a home to petitioner, their only Negro purchaser. Although the white buyers obtained clear title from sellers consistent with their promise of a special warranty deed, respondents asserted below that petitioner is entitled only to a quitclaim deed. The majority in the court below accepts that view; and then, because petitioner seeks the warranted title the court will not give him, denies him a house altogether. This action denies petitioner the rights of his contract and the equal protection of the laws.

In *Shelley* v. *Kraemer*, 334 U.S. 1, and *Barrows* v. *Jackson*, 346 U.S. 249, this Court struck down under the Fourteenth Amendment judicial action supporting racial discrimination in home purchase rights.[1] In the present case similar judicial support to discrimination inheres in the ruling below that housing developers who defaulted on their contract of sale to their single Negro buyer may give him only a quitclaim deed instead of the promised clear title which they freely granted to white buyers under the same form of purchase agreement. Although there is not presented the racial covenant involved in *Shelley*, here judicial support to discrimination is just as direct and immediate; the lower courts' exoneration of sellers from their obligation to grant their single Negro buyer the same clear title granted to their white buyers is a direct violation of equal protection of the laws. As this Court observed in *Shelley* (at p. 19) with respect to the restrictive covenants there in issue, "*the difference between judicial enforcement and nonenforcement . . . is the difference to petitioners between*

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[1] The same result obtains under the Fifth Amendment. See *Bolling* v. *Sharpe*, 347 U.S. 497; *Hurd* v. *Hodge*, 334 U.S. 24.

*being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.*" That observation applies directly here, as does this Court's additional emphasis in *Shelley* that by the action of the lower court Negroes were "denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color."

The racial discrimination judicially assisted by the lower courts in *Shelley* through the *grant* of specific performance has here been equally supported by the *refusal* of specific performance. No less than in *Shelley*, equal protection is offended here by the judicial vindication of racial discrimination; and there is the added consideration in the present case—invoking this Court's supervisory authority—that it is not a state but a federal court which has wrought the constitutional wrong.

Moreover, the Civil Rights Act of 1866, codified as 42 U.S.C. 1982, which this Court invoked in *Shelley* and *Hurd*, is even more applicable in the present case.[8] The statute, which provides that all citizens shall have the same right "*as is enjoyed by white citizens*" *to* "inherit, purchase, lease, sell, hold and convey real and personal property," was originally enacted in April 1866 as the Congressional answer to certain "black codes" which had placed discriminatory restriction on Negroes in their right to pur-

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[8] The significance of this federal statute to the disposition in *Shelley* is discussed in a recent dissenting opinion by Mr. Justice Black. See *Bell v. Maryland*, 378 U.S. at 328-331. As Mr. Justice Black emphasized, in terms directly applicable to the present situation where sellers entered into a contract of sale to a Negro purchaser: "When an owner of property is willing to sell and a would-be purchaser is willing to buy, then the Civil Rights Act of 1866 . . . prohibits a State, whether through its legislature, executive, or judiciary, from preventing the sale on the grounds of the race or color of one of the parties."

chase and sell property. It was the express purpose of the sponsors of the Fourteenth Amendment—which the Congress proposed for adoption only two months after enacting this law—to assure the constitutional validity of the 1866 statute which had been called into question prior to its enactment. See Frank and Munro, *The Original Understanding of "Equal Protection of the Laws,"* 50 Col. L. Rev. 131, 140-141.

Judicial participation in racial discrimination in this case (cf. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725) directly infringes the guarantees of non-discriminatory purchase rights which 42 U.S.C. 1982 and the Fourteenth and Fifth Amendments secure to Negro citizens. Judicial refusal to award a Negro home buyer the rights expressly promised by sellers and denied only to their Negro purchaser, whose contract they have violated for racial reasons, invades the very heart of these guarantees. There are thus presented for this Court's review circumstances which invoke vital rights under the Constitution, the federal statute which the Fourteenth Amendment was intended to confirm, and this Court's supervisory authority over the judicial administration of justice.[9]

2. While these considerations are, we believe, compelling upon the grant of the writ, this Court may desire to reverse summarily on narrower grounds which avoid the constitutional issue. See *United States* v. *CIO*, 335 U.S. 106, 121-122; *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192.

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[9] In the text we urge the applicability of equal protection because of the support to racial discrimination inhering in the refusal below to grant specific performance to petitioner. But here the constitutional infringement is rendered even more serious because the substantive premise of the ruling below is itself legally erroneous. Thus, whereas the judicial enforcement of a contract covenant in *Shelley* was entirely consistent with established substantive law, in the present case the refusal to enforce a contract covenant rests on the incredible proposition that a married seller of realty is legally absolved from his promise to give a warranted title.

For, all apart from racial considerations, it seems clear that the refusal below to grant petitioner specific performance of respondents' express contractual promise to give a "good and sufficient special warranty deed," is wholly arbitrary and unsupportable.

The seventh of the twenty-four convenants which were a part of the terms and conditions of respondents' promise to the petitioner, states (A. 12, 16):

> "(7) Seller agrees to execute and deliver a good and sufficient special warranty deed, and to pay for Federal revenue stamps on the deed."

The ruling below wipes this promised warranty deed out of respondents' obligations to the petitioner on grounds so obscure as to make intelligible statement of them difficult, if not impossible. This is what the reasoning of the court below *appears* to be: the wife of one of the respondents may have a dower interest; petitioner had agreed before the District Court to take the house without any reduction in purchase price because of a possible dower interest; his insistence upon the promised "special warranty deed" constituted a threat to sue against the dower interest which in turn constituted a reduction in price which petitioner had disavowed.[10]

There is no more reason for absolving respondents of the warranty deed promised in the covenant than there would be for freeing them of their tax stamp promise in the same covenant. It would be laughable to say that the

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[10] Judge Sobeloff answers this point succinctly in his dissenting opinion, stating that petitioner "was merely asking for the kind of deed to which he was entitled in consideration of the purchase price which he tendered in full. He was not seeking a reduction in the purchase price; rather the defendants unjustly endeavored to give him less than they had agreed" (*infra*, p. 24).

possibility of suit on the revenue stamps covenant reduces the purchase price on the house. Yet the court below is somehow ruling that the possibility of suit by petitioner on the covenant to deliver a warranty deed does just that. Apparently, as indicated above, the reason the court absolves sellers of their promise of a warranty deed is that the seller in whose name title is registered has a wife with a possible dower interest. Yet it is exactly such contingencies of potential defect in title against which the buyer on the open market—who is purchasing a home, not a husband's interest—is protected by the promise of a warranty deed. The majority below, as the dissenting judges emphasize, is thus excusing the sellers from a promise of good title because of the very contingency which occasioned the promise in the first place.[11] Indeed, if the majority below is right in its construction of the Maryland law, then every home seller's promise to pass a clear interest is converted into a mere promise to qive a quitclaim deed if it later develops that he has a wife. Of course, such novel restrictive principles have no real application to ordinary home purchase transactions—*they arise only*

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[11] Warranted title from the seller is not an impairment of any dower interest—on the contrary, it is an assurance to a buyer in the event a dower interest does arise. If sellers prove to have given defective title, why should they not be accountable in damages on their expressly promised warranty deed? To this crucial question the majority below answer that petitioner agreed before the District Court to take the risk of a subsequent dower right emerging, and that when petitioner insisted before the lower court on the warranty deed promised by the respondents, he was asking the "equivalent of a reduction of the purchase price because of the outstanding inchoate dower right." But petitioner's willingness to risk a dower right emerging later was not a waiver of respondents' covenant obligation to give a warranted deed. Why would petitioner have surrendered before the District Court the covenant protecting him against a subsequent dower or other title impairment, and why did the Court of Appeals require him to do so when it was one of his express covenant rights under the contract with respondents?

*when a Negro seeks a home in a white area, and the seller changes from his usual role of eager purveyor to reluctant and defaulting promissor.*

3. In sum, while the constitutional considerations here presented are compelling upon certiorari, it appears appropriate for this Court summarily to reverse on narrower grounds a ruling which is also wholly erroneous and arbitrary in absolving a defaulting promissor of his covenant. Such a reversal upon the grounds set forth by Judge Sobeloff would serve to rectify the constitutional violation inhering in the present disposition of the case, by granting petitioner the purchase rights promised him and afforded to the sellers' white purchasers. No less than that, we submit, can meet the moving purposes of the equal protection guarantee, as reflected in and secured by petitioner's federal statutory right to purchase real property in the state of Maryland to the same extent "as is enjoyed by white citizens."

## Conclusion

It is respectfully submitted that the writ should be granted and the ruling below summarily reversed on the grounds stated in the dissent below.

Respectfully submitted,

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# APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 9608

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ROLAND E. BARNES, *Appellant and Cross-Appellee,*

*versus*

ABRAHAM S. SIND and ISRAEL COHEN, partners, trading as A. SIND & ASSOCIATES and ABRAHAM S. SIND and ISRAEL COHEN, individually, *Appellees and Cross-Appellants.*

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CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE. ROSZEL C. THOMSEN, DISTRICT JUDGE.

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(Argued November 18, 1964. Decided February 5, 1965.)

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Before HAYNSWORTH, BOREMAN and BRYAN, *Circuit Judges.*

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Joseph L. Rauh, Jr., (John Silard on brief) for Appellant and Cross-Appellee.

Edward Pierson (Morris D. Schwartz on brief) for Appellees and Cross-Appellants.

HAYNSWORTH, *Circuit Judge:*

Cross appeals bring before us a controversy arising out of a real estate transaction. We remand for further proceedings because the appeals have made it apparent that the specific performance ordered by the District Court is inappropriate.

The plaintiff, a Negro, made an abortive attempt to purchase a house and lot in a residential subdivision under development in Maryland. The promoters, moved by

threats of litigation and publicity, finally entered into a settlement agreement which obligated them to sell to the plaintiff an identical house constructed on an equivalent lot in the subdivision [1] and to pay liquidated damages for delay. Thereafter the plaintiff rejected a specific proffer of performance on the ground that the tendered lot was not the equivalent of the one he had first chosen. As the controversy continued it developed that in the view of the plaintiff and his attorney there was no equivalent lot. Interest, however, focused on a lot and house immediately across the street from the residence the plaintiff first sought to buy. The plaintiff offered to accept that with a cash allowance because of claimed lack of equivalence in the lots. He was also claiming liquidated and other damages.

Inability to agree upon performance of their bargain led to this litigation.

In his complaint, the plaintiff sought a mandatory injunction requiring the defendants to convey to him the house and lot he first sought to purchase or an identical house on an equivalent lot, liquidated damages in accordance with the subsequent contract, other compensatory damages, and an injunction prohibiting the sale *pendente lite* of the house and lot known as 11823 Charen Lane, this being the place immediately across the street from the one plaintiff first sought to acquire. Subsequently, however, the plaintiff, through his attorney, offered to purchase the premises known as 11810 Smoke Tree Road, reserving, however, all of his claimed rights to damages. Upon a finding by the District Court that, of the remaining lots unsold, No. 11810 Smoke Tree Road, with an identical house on it, was the most clearly equivalent of the house and lot the plaintiff first selected, it enjoined the sale, pending the litigation, of the Smoke Tree Road house.

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[1] The agreement purported to give them other alternatives, but they are irrelevant here. The alternative that they deliver the house and lot originally selected by the plaintiff was nominal only, for it long since has been sold. They could also have delivered a substantially equivalent house in the Rockville area, but this alternative was not selected within the time limited for its availability.

During the trial, the plaintiff, through his counsel, finally agreed to recognize No. 11810 Smoke Tree Road as equivalent to the one he had sought to buy. In doing so, he recognized the rule that the Court could not require a conveyance to him of the Smoke Tree Road house while the plaintiff contemporaneously was pressing a claim for compensation for want of equivalence.

A grant of specific performance was further complicated by the fact that the legal title to the Smoke Tree Road lot and the other unsold lots was in the name of one of the individual defendants. His wife was not a party to the action. The Court and counsel considered the possible inadequacy of specific relief, and reference was made to the difficulties the plaintiff would encounter in financing his purchase and otherwise should the wife decline to relinquish her dower interest. Nonetheless, the plaintiff insisted he wished the requested specific relief and would accept it notwithstanding its possible infirmities without diminution of the purchase price either because of the earlier claim that the lot was not the equivalent of the first one or on account of the outstanding inchoate dower interest.

Under those circumstances, the District Court granted the specific relief, expressing some wonder that the plaintiff should prefer it to damages. It therefore entered an order requiring the defendants to convey to the plaintiff all of their right, title and interest in the Smoke Tree Road lot with its improvements.

The plaintiff has now appealed insisting that he is entitled to a warranty deed. He wants it for, as he says in his reply brief, "it would merely make the sellers liable for damages on their warranty if an outstanding dower or other impairment of title should later emerge."

The contract does, indeed, call for "a good and sufficient special warranty deed." While it is to be doubted whether under Maryland law a special warranty would give the plaintiff protection against an outstanding dower claim or put him in a position to obtain favorable financing of his purchase, it is perfectly plain from his own assertions that he wants the warranty for the very purpose of supporting a subsequent claim for damages against the defendants.

It is well settled in Maryland that in order to obtain specific performance the applicant must be prepared to pay the full purchase price without deduction for any claimed defect. The rule has been specifically applied in cases where there was an inchoate right of dower in one not a party to the action and against whom the Court was powerless to grant relief.[2] In such a situation the applicant must content himself with damages or must pay the full purchase price for such title as the defendants can convey to him subject to the inchoate right of dower.

These rules the District Court recognized. It specifically referred to them in its opinion. Clearly, it ordered the defendants to give to the plaintiff a quitclaim deed for the very purpose of assuring that the plaintiff's representation that he was prepared to pay the full purchase price for such title as was vested in the defendants would be complied with, and that there would be no subsequent controversy about it.

The plaintiff's appeal and his frank statement that he wants the warranty for the purpose of a subsequent claim for damages against the defendants makes it apparent beyond controversy that he never intended to comply with his representation that he was prepared to pay the full purchase price for the defendants' title, subject to the dower interest. He wants the dower interest, and, failing to secure its release, he insists that he is entitled to damages against the defendants. That is the precise equivalent of a reduction of the purchase price because of the outstanding inchoate dower right.

When the demand for specific performance is so intimately and insistently coupled with a claim of entitlement to a reduction of the purchase price, specific performance is inappropriate under the Maryland cases.

Under these circumstances, we might affirm the order of the District Court granting specific performance to the extent of ordering the defendants to deliver a quitclaim deed to the plaintiff. That would be obviously unacceptable

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[2] Trotter v. Lewis, 185 Md. 528, 45 A. 2d 329, 334; see also Whittle v. Brown, 217 Md. 161, 141 A. 2d 917; Schneider v. Davis, 194 Md. 316, 71 A. 2d 32.

to the plaintiff-appellant, however, and the frank statement of his intention in his brief on appeal discloses plainly now what was obscured in the District Court—that he never was prepared to take the step of an unequivocal payment of the full purchase price by which alone he would be entitled to specific performance. If the plaintiff had informed the District Court of his intention, which he has laid bare before us, the District Court would not have entered the order it did. The appropriate course is a vacation of the order of the District Court and a remand of the case for further proceedings. The plaintiff is entitled to damages for the breach of the contract. Subsequent proceedings will be necessary in order to give him an opportunity to prove what damages, if any, he has suffered from the breach.

The District Court has already computed and allowed to the plaintiff damages he suffered by reason of delay in performance. It refused to allow liquidated damages called for by the contract upon the ground that they were clearly penal in nature and not compensatory. The plaintiff has also complained upon appeal of the disallowance of the liquidated damage claim, but we think there was an adequate basis for the District Court's conclusion that they were penal and unallowable.

No one has complained of the District Court's computation and award of actual damages suffered by the plaintiff from delay of performance. Since there is to be no specific performance of the contract, however, the parties and the District Court may wish to reconsider those elements of general damages for the breach to which the plaintiff will be entitled.

The judgment below will thus be vacated in its entirety, so that the District Court may award such damages as may be appropriate, free of any restrictive effect of the earlier order.

The defendants have filed a cross appeal, in which they have contested the appropriateness of specific performance on a number of grounds. In addition to the one we have considered, they are founded principally upon the nature of the original purchase offer and the circumstances sur-

rounding the execution of the subsequent settlement agreement. We need not consider those contentions in light of our conclusion that the plaintiff's claims make specific performance inappropriate.

*Vacated and remanded.*

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 9608.

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ROLAND E. BARNES, *Appellant and Cross-Appellee,*

*versus*

ABRAHAM S. SIND and ISRAEL COHEN, partners, trading as A. SIND & ASSOCIATES and ABRAHAM S. SIND and ISRAEL COHEN, individually, *Appellees and Cross-Appellants.*

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CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND, AT BALTIMORE.

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(Filed June 4, 1965.)

ON PETITION FOR REHEARING EN BANC

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HAYNSWORTH, *Chief Judge,* BOREMAN and BRYAN, *Circuit Judges:*

We find nothing in the petition for rehearing en banc which did not receive the full consideration of the Court. The petition for rehearing en banc is denied for the reasons stated in the opinion of the Court.

In light of the dissenting opinion of Judge Sobeloff, in which Judge Bell joins, it may be appropriate to add a few brief comments.

It is very doubtful that the lady has any dower interest in this land held in the name of her husband for the benefit

of a business partnership of which he is member.* If she has none, even a general warranty deed would confer no right of recovery upon the purchaser for there would be no violation of the warranty.

Whether or not the wife does have a dower interest in the land could have been tested in this action by the simple device of a joinder of the wife. The plaintiff elected not to do that. If the plaintiff had been willing to accept a quit-claim deed under the decree of the district court, he could still have tested the potential dower claim in an action to remove the cloud upon his title. That the plaintiff was unwilling to do.

Finally, the special warranty deed the contract called for would appear to give protection only against the claims of the grantors, their representatives and assigns. It would seem most unlikely that under the Maryland law such a warranty would be violated by an outstanding dower interest known to the parties at the time the deed was given and accepted. Nevertheless, the decree of the district court was wholly unacceptable to the plaintiff and it was the plaintiff wh brought the case here on appeal for the stated purpose of giving him some semblance of a basis for a subsequent lawsuit for damages, or to what amounts, in effect, to a diminution of the purchase price.

It is time this litigation approached its end and that current claims be disposed of without encouraging further litigation and shadow-boxing on the basis of still other claims.

Since the district court's decree of specific performance was unacceptable to the plaintiff, as was every house and lot tendered to him as the equivalent of the one he first sought to buy, it now seems appropriate that he should be limited to his damages.

This extended, expensive litigation resulting in an award of damages is not likely to lead other developers of residential real estate to believe that "it is comparatively safe to renege on a sale to a Negro purchaser."

*Petition Denied.*

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* See Annotated Code of Maryland (1957), Art. 73A, §§ 8 and 25(2)(e).

ON PETITION FOR REHEARING

SOBELOFF, *Circuit Judge* whom J. SPENCER BELL, *Circuit Judge*, joins, dissenting:

During October, 1961, the plaintiff entered into an agreement with the selling agents of the defendants, Sind and Cohen, business partners, for the purchase of a certain house in their housing development. The agreement provided that the house was to be conveyed by a special warranty deed. Upon discovery that the purchaser was a Negro, the defendants, interposing a series of obstructions, struggled hard to avoid their obligation. A second agreement was reached in January, 1962, by which the plaintiff undertook, in order to settle the controversy, to accept an "equivalent" but, in his opinion, less desirable house.

When the defendants refused to comply with the settlement agreement, an action was brought by the plaintiff for specific performance and damages caused by the delay. The District Court decreed specific performance by the delivery of a quitclaim deed and awarded $1500 in damages for the delay. The decree was deficient, the plaintiff contends, in that it did not require the inclusion of a special warranty in the deed as called for in the original agreement and as is customary in Maryland. The quitclaim deed, unlike the contracted for special warranty deed, would not enable Barnes to sue the defendants if he should sustain damages by reason of their failure to obtain the joinder by the wife of one of them in bar of her dower rights.

This court on appeal, far from correcting this alleged error of the District Court, puts the plaintiff in a worse position by taking away the limited relief granted him by way of specific performance. Instead the case is remanded for a determination of damages for breach of the contract.

The opinion of our court concentrates on the refusal of the plaintiff to agree in advance that he would not later sue upon the special warranty, if it should be included in the deed. Maryland law is cited to the effect that specific performance will be decreed only when the buyer tenders the full purchase price. The court analogizes the plaintiff's

position to that of one who tenders less than the entire purchase price when he seeks specific performance.

I am unable to agree with this reasoning. The plaintiff was merely asking for the kind of deed to which he was entitled in consideration of the purchase price which he tendered in full. He was not seeking a reduction in the purchase price; rather the defendants unjustly endeavored to give him less than they had agreed.

It would be time enough to consider what rights the plaintiff might have against the defendants on account of any outstanding dower claim when and if he later brought an action. However, suit on a special warranty is precluded by the nature of the District Court's decree for a quitclaim deed only, and at a minimum an affirmance would assure against the plaintiff's maintaining a successful damage suit on account of the wife's non-waiver of dower.

The foregoing discussion by the majority only points up the injustice of denying the plaintiff specific performance, even to the limited extent granted by the District Court. If, as the majority thinks, there is only slight possibility of a successful action for damages on account of the wife's dower claim, then the plaintiff's refusal to relinquish this cause of action does the defendants no injury and it should not stand as a bar to specific performance.

Barnes appears justly entitled to some form of specific performance unless there are valid defenses not indicated in the court's opinion. A court is not free to deny this equitable remedy on "discretionary" grounds; it is legally arbitrary to deny the remedy here. If ever there was an instance in which money damages would seem inherently inadequate, or at best very difficult to determine, this is it. We thus have the classic justification for granting specific performance.

Remand for the assessment of damages holds no terror for these defendants. This disposition of the case will have no deterrent effect upon other developers who discover that it is comparatively safe to renege on a sale to a Negro purchaser.

I would grant the motion for a rehearing.

JUDGMENT

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 9608

ROLAND E. BARNES, *Appellant and Cross-Appellee,*

*vs.*

ABRAHAM S. SIND and ISRAEL COHEN, partners, trading as A. SIND & ASSOCIATES and ABRAHAM S. SIND and ISRAEL COHEN, individually, *Appellees and Cross-Appellants.*

CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

This cause came on to be heard on the record from the United States District Court for the District of Maryland, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, vacated; that this cause be, and the same is hereby, remanded to the United States District Court for the District of Maryland, at Baltimore, for further proceedings not inconsistent with the opinion of the Court filed herein; and that the costs on appeals be paid by the Appellant and Cross-Appellee.

February 5, 1965.

CLEMENT L. HAYNSWORTH, Jr.,
*Chief Judge, Fourth Circuit.*

(Filed—February 5, 1965. Maurice S. Dean, Clerk.)